## BEFORE THE APPEALS BOARD FOR THE KANSAS DIVISION OF WORKERS COMPENSATION

PORTIA MCLEMORE	)
Claimant	
VS.	
	) Docket No. 1,007,213
WAL-MART	)
Respondent	)
AND	
	)
AMERICAN HOME ASSURANCE COMPANY	)
Insurance Carrier	)

### ORDER

The respondent and its insurance carrier appealed the July 9, 2003 preliminary hearing Order entered by Administrative Law Judge Brad E. Avery.

#### Issues

Claimant alleges she injured her low back on July 14, 2002, while working for her employer, Wal-Mart, when she picked up a 24-can case of soda pop. The employer and its insurance carrier dispute that claimant injured her back at work.

This Board has previously determined claimant's low back injury arose out of and in the course of her employment with Wal-Mart. In a March 20, 2003 Order, the Board concluded in part:

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence. Here, the evidence does conflict regarding what claimant may or may not have told the emergency room personnel on the date of the accident. However, the incident log prepared by Wal-Mart does indicate claimant was having low back pain and that it occurred at the cash register in the front end of the store, which is where claimant worked. The Board finds that claimant has proven by a preponderance of the credible evidence that her back pain occurred as the result of activities associated with her employment at the cash register at the Wal-Mart store. The Board,

<sup>&</sup>lt;sup>1</sup> K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

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therefore, finds that the Order of [the] Administrative Law Judge granting claimant benefits in the form of temporary total disability compensation and medical treatment should be affirmed.

Following the Board's March 20, 2003 Order, the employer and its insurance carrier requested the Judge to terminate claimant's benefits. Following a motion hearing, Judge Avery denied that request in the July 9, 2003 Order, which stated, in pertinent part:

Motion to terminate benefits denied. The court finds that Dr. Geis's report contains no new evidence that has not been considered by the Court and the Board previously.

The employer and its insurance carrier contend Judge Avery erred. They challenge the Judge's finding that no new evidence was presented at the second hearing. Moreover, they continue to challenge that claimant's low back injury arose out of and in the course of employment with Wal-Mart. Accordingly, they request the Board to reverse the July 9, 2003 Order and to terminate claimant's benefits.

Conversely, claimant requests the Board to affirm the July 9, 2003 Order.

The only issue before the Board on this appeal is whether claimant's low back injury arose out of and in the course of employment with Wal-Mart.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and after considering the parties' arguments, the Board finds and concludes the July 9, 2003 Order should be affirmed.

At the July 8, 2003 hearing, the employer and its insurance carrier presented the medical report prepared by Dr. Dick Geis, who examined claimant on April 23, 2003, at the request of the employer and its insurance carrier's attorney. In that report, Dr. Geis provides his opinion that there is insufficient evidence that claimant's current symptoms are causally related to lifting a case of pop as alleged. As indicated by his written report, the doctor made that conclusion based upon the histories recorded in emergency room records that were generated due to claimant's July 14, 2002 visit to Stormont-Vail Emergency Department.

The emergency room records (and the questions raised by those records) were considered by the Board when it entered its March 20, 2003 Order, which found this claim compensable. The Board finds no reason to disturb its earlier findings and conclusions. Accordingly, the Board concludes that claimant's low back injury arose out of and in the course of her employment with Wal-Mart.

WHEREFORE, the Board affirms the July 9, 2003 Order entered by Judge Avery.	
IT IS SO ORDI	ERED.
Dated this	_ day of October 2003.

# **BOARD MEMBER**

c: Timothy J. Pringle, Attorney for Claimant
James B. Biggs, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director